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May 19, 2017

BY ECF

Honorable Nicholas G. Garaufis
United States District Court, Eastern District of New York
225 Cadman Plaza East, Room 1230
Brooklyn, New York 11201

Re: ***Young v. Portfolio Recovery Associates, LLC, 15-cv-05854-NGG-RML***
Letter Request for Pre-Motion Conference

Dear Judge Garaufis:

This firm represents defendant Portfolio Recovery Associates, LLC ("PRA") in this proceeding. Defendant respectfully requests a pre-motion conference to discuss PRA's request to file a motion for summary judgment in this matter.

Timing of this Request

By ECF Order dated March 3, 2017, Magistrate Levy set a May 5, 2017 deadline for the parties to file letters to Your Honor requesting pre-motion conferences to file dispositive motions. On May 5, 2017, the parties filed a joint request for a two week extension of this deadline so that Plaintiff could consider PRA's outstanding settlement offer. *See* Doc. No. 40. There has been no ruling on this request and Plaintiff's counsel has not responded to PRA's settlement offer or PRA's inquiry into whether it has even been communicated to Plaintiff. For these reasons, PRA respectfully requests that Your Honor consider this request for pre-motion conference.

Statement of Facts

Plaintiff brings this lawsuit for alleged violations of the Fair Debt Collection Practices Act ("FDCPA") and NY CLS Gen Bus § 349 ("GBL § 349"). Prior to the events described below, PRA filed a verified complaint styled *Portfolio Recovery Associates, LLC v. Susan Young*, Index No. CV-005237-14 (the "Collection Lawsuit"). It is uncontested that an Answer was subsequently filed on behalf of Plaintiff by Attorney Steven Rinsler. Discovery in this case has shown that the Answer and alleged communications between Mr. Rinsler and PRA regarding the Answer were not recorded in either of PRA's internal databases. Thereafter, PRA sent a letter dated October 12, 2014 (the "3215 Letter") directly to Plaintiff. This letter provided Plaintiff with an additional copy of the Summons and Complaint filed against her, which is required by NY CPLR 3215 before obtaining a default judgment.

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Shortly after receiving the 3215 Letter, Plaintiff contacted Mr. Rinsler who assured her that an Answer had been filed. On October 28, 2014, Mr. Rinsler contacted PRA's litigation department regarding the 3215 Letter. After this communication, PRA directed all subsequent correspondence to Mr. Rinsler.

On October 11, 2015, Plaintiff filed the underlying action alleging that the single 3215 Letter violated the FDCPA and GBL § 349.

The Bona Fide Error Defense

Because the FDCPA is a strict liability statute, even "unintentional" violations render a debt collector liable. However, Section 1692k of the FDCPA provides a reprieve to debt collectors who inadvertently violate the FDCPA after establishing procedures to ensure that the violation would not occur. Section 1692k(c) states:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

To prevail on a bona fide error defense, a debt collector must prove three criteria by a preponderance of the evidence. A debt collector must show the FDCPA violation was (1) unintentional; (2) resulted from a bona fide error; and (3) occurred despite procedures reasonably adapted to avoid such errors. *Puglisi v. Debt Recovery Sols., LLC*, 822 F. Supp. 2d 218, 220 (E.D.N.Y. 2011).

PRA has produced significant testimony and written policies to support that it maintains procedures reasonably adapted to avoid violations of the FDCPA. Further, PRA has produced significant testimony that its sending of the 3215 Letter to Plaintiff after she was represented by counsel was unintentional. The Courts that have analyzed this element generally hold that only the violation of the FDCPA has to be unintentional and not the alleged violative act. *Johnson v. Riddle*, 443 F.3d 723, 728 (10th Cir. 2006) ("[A] debt collector must show that the violation was unintentional, not that the underlying act itself was unintentional."); *Frye v. Bowman*, 193 F. Supp. 2d 1070, 1088 (S.D. Ind. 2002). Thus, where a collection letter caused the alleged violation, a defendant using the bona fide error defense need not prove that the dispatch of the communication itself was unintentional, but rather that the communication was not intended to violate the FDCPA. *Frye*, 193 F. Supp. 2d at 1088. Simply stated, a violation is unintentional for purposes of the FDCPA's bona fide error defense if the debt collector can establish the lack of specific intent to violate the Act. *See Johnson*, 443 F.3d at 728. In determining the intent element of the bona fide error defense, the court in *Johnson* looked at the plain language of the statute, stating §1692k(c) requires proof that "the *violation*" was not intentional, as opposed to proof that "the conduct" was not intentional. *Id.*

The Second Circuit's analysis of the bona fide error defense encompasses this reasoning. *See Katz v. Asset Acceptance, LLC*, Civil Action No. CV-05-2783 (DGT), 2006 U.S. Dist. LEXIS 86634, at *7 (E.D.N.Y. Nov. 29, 2006) (finding that defendant unintentionally filed a collection complaint in the wrong venue). In *Katz*, the plaintiff filed an FDCPA claim because the defendant initiated a collection action in the wrong venue. *Id.* In response, the defendant argued that the filing of the collection action in the wrong venue was the result of a bona fide error. *Id.* The *Katz* court agreed, stating that the defendant unintentionally designated the wrong court as the appropriate venue and that such designation was a result of a clerical error. *Id.*

Application to Plaintiff's Claims

In this case, the Complaint alleges PRA violated the FDCPA by contacting Plaintiff after she was represented by counsel. PRA contends that its communication with a represented party was the result of a bona fide error. PRA only contacted Plaintiff because its internal databases did not reflect that a Notice of Appearance or Answer had been filed in the Collection Lawsuit. PRA admits to sending the letter but alleges that its violation of the section 1692(c) of the FDCPA precluding communications to a represented consumer was unintentional. The purpose of NY CPLR 3215 is to allow the Defendant to move for default judgment. Although not reflected in its system, because an Answer had already been filed, PRA would not have been able to obtain a default judgment and sending the 3215 Letter was meaningless. Even if Mr. Rinsler would have spoken with a PRA employee prior to entering an appearance in the matter, because that information was not incorporated into its sophisticated internal databases, the bona fide error defense should apply.

Regarding intent, the facts in *Katz* are analogous to this case. In *Katz*, it is undisputed that the defendant engaged in an act which violated the FDCPA, the filing of a collection action in the wrong venue. However, the defendant in *Katz* successfully argued that it did not intend to violate the FDCPA, stating that the filing of the collection suit in the wrong court was a result of a clerical error and that there were procedures to avoid those errors. Similarly, in this case, it is undisputed that PRA engaged in an act which violated the FDCPA, the sending of a 3215 Letter. However, the violating act was a result of an unintentional clerical error in that PRA employees had failed to document that Plaintiff's counsel had responded to PRA's collection action.

At bottom, an FDCPA violation is unintentional for purposes of the bona fide error defense if the debt collector can establish the lack of specific intent to violate the FDCPA. Here, it is obvious that PRA did not intend to violate any consumer protection statute in its efforts to comply with NY CPLR 3215. Through a documented clerical error, PRA's records simply did not reflect that Plaintiff was represented at the time the letter was sent.

Outstanding Matters

On March 25, 2017, Magistrate Levy Ordered that Plaintiff produce to chambers "copies of all retainer agreements between Mr. Keshavarz and plaintiff Young in effect in this case since

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1/6/16." This Order was the result of multiple previous Orders by Judge Levy based on PRA's concerns that the retainer agreements included provisions authorizing the sharing of attorneys' fee awards with Plaintiff and giving Mr. Keshavarz final authority to approve or reject settlement offers. On April 21, 2017, having heard nothing on the topic, we contacted opposing counsel to determine if the retainer agreements had been provided to the Court and to request a copy of any cover letter that may have been included therewith. On April 24, 2017, we were made aware that Plaintiff provided the relevant retainer agreements to the Court by cover letter dated March 27, 2017. Counsel for PRA was not included on this, or any other *ex parte* communications to the Court. Further, that these *ex parte* communications address evidentiary issues raised by PRA in this matter. For this reason, PRA has requested that any *ex parte* communications between Plaintiff and the Court be produced in unredacted form for its review. PRA further requests the opportunity to address any *ex parte* arguments made by Plaintiff regarding this issue. As previously stated, we understand that Plaintiff is claiming privilege over the retainer agreements themselves and they will be provided to us, if at all, in the Court's discretion. PRA has merely requested unredacted copies of any communications between Plaintiff and the Court although PRA agrees that Plaintiff can redact any portion of these communications that *expressly quotes* the retainer agreements themselves.

We thank Your Honor for your consideration of this matter. If Your Honor has any questions, please do not hesitate to contact my office.

Respectfully submitted,

/s/ Jonathan P. Floyd

Jonathan P. Floyd

cc: All Counsel of Record (via ECF)